United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1971

To be argued by
PATRICIA M. HYNES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1971

UNITED STATES OF AMERICA,

Appellee,

—v.—

HAROLD NISNEWITZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases:

PAGE

TABLE OF STATUTES AND RULES

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Harold Nisnewitz appeals from a judgment of conviction entered on July 11, 1974, in the United States District Court for the Southern District of New York after a seven day trial before the Honorable Richard Owen, United States District Judge, and a jury.

Indictment 74 Cr. 96, filed January 30, 1974, charged Nisnewitz in seven counts with making, aiding in making, and conspiring to make and aid in making false statements in loan applications submitted to federally insured banks for the purpose of influencing the action of the banks in violation of Title 18, United States Code, Sections 1014, 371 and 2.

Count 7, the conspiracy count, in addition to Nisnewitz named Jose Ramos, Jr., a loan officer at First National

City Bank, and Thomas La Morte, a loan officer at the National Bank of North America, as defendants. Four other individuals, Natalie V. Prenclau, Roger La Ferla, Gustavo Ramirez, and Johnny A. Rodriguez, the loan applicants in counts 1 through 6, were named as co-conspirators but not as defendants.

Trial commenced on May 1, 1974 and ended on May 10, 1974 with a guilty verdict as to Nisnewitz on each of the seven counts in which he was charged. Defendant La Morte was acquitted on count 7, the only count in which he was charged. Prior to trial defendant Ramos pled guilty to count 7, the only count in which he was charged.

On July 11 1974, Judge Owen sentenced Nisnewitz to prison for one year and one day concurrently on counts 1 through 6 and on count 7 to one year and one day to run consecutively with counts 1 through 6. Imposition of sentence was suspended on count 7 and Nisnewitz was placed on probation for five years. Nisnewitz is free on a $10,000 personal recognizance bond pending appeal.

Statement of Facts

The Government's Case

Through the testimony of Natalie V. Prenclau, Roger La Ferla, Gustavo Ramirez and Johnny A. Rodriguez, the loan applicants named in counts 1 through 6 of the indictment, the Government proved that Nisnewitz, an accountant, for a fee of $100 to $150, prepared loan applications containing false statements concerning, among other things, the employment and income of the loan applicants which loan applications were then submitted to First National City Bank and Manufacturers Hanover Trust Company. All but one of the applicants were unemployed at the time the loan applications were submitted to the banks. The

loan applicants testified that Nisnewitz gave them completed typed loan applications and sent them to Mr. Ramos at the First National City Bank at Canal Street in Manhattan. Some of the loan applicants were also sent to a branch of the Manufacturers Hanover Trust Co. in Queens.* The evidence also established that La Morte told Ramos that Nisnewitz would contact Ramos about loan applicants (Tr. 266) and that Ramos was contacted by either Nisnewitz or La Morte before the loan applicants came to see him (Tr. 268-69, 273-74, 280) and further that Ramos received money when a loan application referred to him by Nisnewitz or La Morte was approved (Tr. 271-73, 277).

The loan applicants also testified that they sought the loans in order to invest in Dare To Be Great or Koscot Interplanetary, Inc. (Koscot), both pyramid selling programs of Glen W. Turner Enterprises, and all had been referred to Nisnewitz by someone connected with either Dare To Be Great or Koscot.

A. The Prenclau Application

Natalie Prenclau Rowe (count 1; GX 1) testified that she went to Nisnewitz in early January 1972 in connection was getting a $1,000 loan (Tr. 90-92).** She told Nisnewitz she was not employed (Tr. 92). When Nisnewitz asked if she had a friend who could verify her employment,

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* The evidence established that the deposits of both banks were insured by the Federal Deposit Insurance Corp. (Tr. 46, 49). The proof also showed that loan applications submitted to the branch of the Manufacturers Hanover Trust in Queens were forwarded to that bank's main office in Manhattan for processing, credit checks and approval or declination (Tr. 49-50).

** GX refers to Government exhibits in evidence; "Tr." refers to the transcript of the trial record; "Br." refers to appellant's brief; citations followed by the letter "a" are to appellant's appendix.

she responded that she had a friend at the Salvation Army and that she would talk to him (Tr. 93). Mr. Nisnewitz told her that if she got the $1,000 loan she would have to pay him $150 (Tr. 92). Ms. Rowe went to see Nisnewitz a second time and told him that her friend would verify her employment at the Salvation Army if a bank called (Tr. 94). Mr. Nisnewitz gave her a typed loan application (Tr. 95) listing the Salvation Army as her place of employment (GX 1) and told her to go to First National City Bank at Canal Street in Manhattan (Tr. 96). Ms. Rowe went to the bank and gave the application to Mr. Ramos (Tr. 129; GX 1; Tr. 267-69). The loan was approved. Thereafter she went to the bank and picked up the proceeds of the loan. She then put $100 in an envelope for Nisnewitz and purchased a $50 money order pursuant to Nisnewitz's instruction. Upon returning home, she found Nisnewitz waiting for her (Tr. 97-98). Ms. Rowe further testified that she gave Nisnewitz the $100 in cash and the $50 money order, after completing the money order according to Nisnewitz's directions * (Tr. 99).

Ramos testified that La Morte called and told him that Ms. Prenclau would be coming in to see him about a loan. After the Prenclau application had been submitted to Ramos, La Morte called him several times to check on the loan and told Ramos if it was approved, there would be some money in it for him (Tr. 268-271). Ramos testified that the central office of the bank sent the Prenclau application back to him and requested proof of income and additional identification (Tr. 270). Ms. Prenclau had only shown Ramos her social security card as identification (Tr. 269). Ramos testified that he was unable to verify the income of Ms. Prenclau nor did he get additional iden-

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* Ms. Rowe could not remember the name which Nisnewitz directed her to put on the money order. However, she testified that it sounded French to her (Tr. 99).

tification from Ms. Prenclau (Tr. 276-71). Notwithstanding this Ramos approved the loan. After the loan was approved, La Morte called Ramos and told him that he expected to receive a $15 money order for Ramos. Shortly thereafter, La Morte met Ramos and gave him $15 in cash (Tr. 272).

B. The La Ferla Application

Roger La Ferla (count 2; GX 2) testified that he and Mr. and Mrs. Walther went to see Nisnewitz at the end of January or the beginning of February 1972 in connection with getting a loan to invest in Dare To Be Great (Tr. 375). Mr. Walther also wanted a loan to invest in Dare To Be Great (Tr. 426). Nisnewitz told La Ferla and Walther there would be a charge of $150 each for him to put the loan through (Tr. 376, 426-27). La Ferla and Walther each paid Nisnewitz $150 (Tr. 377, 427). La Ferla and Mr. and Mrs. Walther testified that La Ferla told Nisnewitz he was not employed (Tr. 377, 427-28, 448). Nisnewitz asked La Ferla if he knew of anyone who would give him a job reference. La Ferla said "no" (Tr. 377, 427-28). Nisnewitz told La Ferla he would get him a job reference (Tr. 377, 427-28). Nisnewitz told La Ferla he would use Johnna Graphics, which was located next door to Mr. Nisnewitz's office (Tr. 493-94), as a job reference for La Ferla and that he would use his own office telephone number so he could verify La Ferla's employment if a bank called (Tr. 381, 390, 428, 448). Nisnewitz gave the information for the loan applications to his wife who typed bank applications for Manufacturers Hanover Trust for both La Ferla and Walther * (Tr. 378, 428). Nisnewitz told La Ferla and Walther to take the loan applications to Mr. Westphal at Manufacturers Hanover. They did so,

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* These applications were not charged as counts in the indictment.

but they later learned the loans were declined (Tr. 379, 428-29). La Ferla and Walther went back to see Nisnewitz, and again Mr Nisnewitz had loan applications typed for them by his wife, this time for First National City Bank * (GX 2; Tr. 380-82, 393, 429-30). Nisnewitz told La Ferla and Walther that there would be an additional charge of 5% if the loans were approved at First National City Bank ** (Tr. 380, 427, 429-30). On La Ferla's application to First National City Bank, Johnna Graphics was again used as his place of employment only this time Nisnewitz told La Ferla he would use the phone number for Johnna Graphics not his own office number (Tr. 390-91). After the applications for La Ferla and Walther were typed, Nisnewitz put them in an envelope and told La Ferla and Walther to see Mr. Ramos at the First National City Bank in lower Manhattan (Tr. 393, 430). Upon arriving at the bank they learned that Mr. Ramos was on jury duty. La Ferla called Nisnewitz who told him to see Mr. Scully at the bank which they did (Tr. 393-94, 431). Neither La Ferla nor Walther got a loan from First National City Bank. The application prepared by Mr. Nisnewitz and submitted by La Ferla to the First National City Bank falsely stated that La Ferla was employed by Johnna Graphics at a salary of $12,740; that he had additional income of $3,500 and that the purpose of the loan was wedding expenses (GX 2; Tr. 381-82, 392-93).

C. The Ramirez Applications

Gustavo Ramirez (Counts 3-4; GX 3 & 4) testified that he went to see Nisnewitz in January 1972 in order to obtain a loan to invest in Dare To Be Great (Tr. 55). Nisnewitz told him it would cost him $150 which Ramirez paid to

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* Only the application of La Ferla to First National City Bank is the subject of a count in the indictment: Count 2 (GX 2).

** Mrs. Walther also testified about this conversation (Tr. 449).

Nisnewitz (Tr. 56). When he went to Nisnewitz, Ramirez was employed by Cadillac Motor Car Division of General Motors, earning a salary of $8,600 (Tr. 53,; and he gave this information to Nisnewitz together with his date of birth, March 1, 1951 (Tr. 53-54, 58). Ramirez returned to Nisnewitz's office a second time, and Nisnewitz gave him a sealed envelope with the name Westphal on it and told him to go to Manufacturers Hanover Trust in Queens and give the envelope to Mr. Westphal, which he did (Tr. 59-60; GX 3). Ramirez signed the application at the bank and later was advised by Westphal that his loan had been declined (Tr. 60-61).

Ramirez called Nisnewitz and told him the loan was declined. Nisnewitz called Ramirez back and told him to return to his office because he had another bank to try (Tr. 61). Ramirez went to Nisnewitz's office, and again Nisnewitz gave him a sealed envelope and told him to see Mr. Ramos at First National City Bank (Tr. 62). Nisnewitz told Ramirez that if the loan was approved by Ramos that Ramirez would have to pay a fee of 5% of the loan (Tr. 62). Ramirez gave the envelope to Ramos, and a few days later Ramos called Ramirez and asked him to see him. Ramirez went and was told by Ramos that he needed a cosigner. Ramirez took the application from Ramos and ripped it up (Tr. 63), and again called Nisnewitz. Nisnewitz told him he would speak to Ramos "to take care of the matter" and would get back to him (Tr. 63). Nisnewitz called Ramirez back and asked him to come to his office. Ramirez again went to Nisnewitz's office (Tr. 63) and Nisnewitz again gave him an application in an envelope but this time Nisnewitz told Ramirez that he also needed a W-2 statement. Nisnewitz had a W-2 statement typed by his wife which stated an annual salary of $10,500 (GX 4; Tr. 64, 196, 218-19, 275). Nisnewitz told Ramirez to give the application and W-2 statement to Ramos and to rip up the W-2 statement after he

showed it to Ramos which Ramirez did (GX 4; Tr. 64-65, 220). The loan was approved (Tr. 65). Ramirez testified that when he went to pick up the proceeds of the loan, $1,417.68 (GX 4; Tr. 277), from Ramos he asked Ramos "how do you want me to pay?" (Tr. 66). He further testified that Ramos gave him an envelope and told him to put $70 in the envelope and meet him outside which Ramirez did (Tr. 66, 200-201).*

Ramos testified that Nisnewitz called him and told him that Ramirez would be coming to see him about a loan (Tr. 274). Ramos said that with respect to the loan application of Ramirez (GX 4), he was shown a W-2 statement showing total wages of $10,500 and made a notation of that on the back of the loan application (GX 4; Tr. 275). Ramos also testified that he did not see a birth certificate with a date of birth of March 1, 1947, although he noted that on the back of the application (GX 4; Tr. 275) nor did he see any proof of income for the part-time employment stated on the loan application (GX 4; Tr. 276). Ramos further testified that when Ramirez came to pick up the loan money, Ramos told Ramirez $70 would be fine and gave him an envelope to put it in which Ramirez did (Tr. 277-78). Ramos testified that he split the $70 he received from Ramirez with Thomas La Morte (Tr. 279).

The two loan applications prepared by Harold Nisnewitz and submitted to Manufacturers Hanover Trust and First National City Bank by Gustavo Ramirez (GX 3-4), each falsely stated that Ramirez earned an annual salary of $10,256; that he had additional income of $3,500 as a part-time salesman; that the purpose of the loan was for furniture and a vacation and that Ramirez was born on March 1, 1947 (Tr. 68-70, 73-74).

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* Seventy dollars is 5% of the loan proceeds.

D. The Rodriguez Applications

Johnny A. Rodriguez (counts 5-6; GX 5-6) testified that he, together with Willie Colon and a man named Bennie, went to see Nisnewitz in December 1971 in connection with getting a $5,000 loan for Rodriguez to invest in Koscot, and that Nisnewitz told Rodriguez he would have to give him $100 which he did (Tr. 222-224). Rodriguez testified that he told Nisnewitz he was not employed and was on welfare (Tr. 225), and that Nisnewitz asked if he had any friends who could say he was "working at this place" if a bank called, to which Rodriguez responded "no" (Tr. 225). Rodriguez testified that Nisnewitz then called Willie Colon into his office and Nisnewitz decided to put "Colon's Body Shop" as the place of employment for Rodriguez using Willie Colon's home address and telephone number (Tr. 225-26, 228), and that Rodriguez was earning $16,000 plus $4,000 in commissions. Rodriguez then testified that Nisnewitz gave this information to Mrs. Nisnewitz who typed the loan application; that Nisnewitz put the typed application in an envelope and told Rodriguez to take it to Manufacturers Hanover Trust and give it to Mr. Westphal, which he did (Tr. 226-29; GX 5). Rodriguez did not get a loan from Manufacturers Hanover Trust Co. Rodriguez testified that thereafter he spoke to Nisnewitz and Nisnewitz asked him to come to his office as he had another connection and another bank (Tr. 231). Rodriguez went to see Nisnewitz again, and Nisnewitz told him about Ramos at First National City Bank on Canal Street (Tr. 231). Nisnewitz told Ramirez that if the loan went through at the First National City Bank Rodriguez would have to pay a percentage of 5% to Ramos under the table (Tr. 235, 260). Rodriguez testified that Nisnewitz followed the same procedure in completing the loan application for First National City Bank, *i.e.* he gave information to Mrs. Nisnewitz who typed the application. On this application Nisnewitz put down that Rodriguez was making $20,000 plus $4,000 additional income (GX 6; Tr. 231, 236-38). Nisnewitz told

Rodriguez to hold on to the loan application because Ramos was not at the bank at that time and that Rodriguez should keep calling Nisnewitz to find out when Ramos would return. Rodriguez did this and after several calls Nisnewitz told him that Ramos was back (Tr. 231-32). Rodriguez went to Ramos and gave him the loan application (GX 6; Tr. 279-80). He never obtained the loan at First National City Bank (Tr. 238).

Ramos testified that Nisnewitz called him and told him that Rodriguez would be coming in to see him about a loan (Tr. 280). Ramos testified that Rodriguez did not submit any proof of employment in connection with the loan application and that the application was declined (Tr. 282).

The Defendant's Case

Nisnewitz testified in his own behalf. He admitted completing the loan applications in counts 1 through 6 but denied with one exception * that he had any knowledge that the information contained in the loan applications was false and that any information contained in the applications came from the applicants. He admitted charging a fee of $100 to $150 but said that the fees were for future accounting services and had nothing to do with his completing the loan applications.

Prenclau

Appellant testified that toward the end of 1971 people were referred to him in connection with Dare To Be Great and Koscot (Tr. 530). Nisnewitz stated that in the latter part of December 1971 or the beginning of January 1972 Natalie Prenclau came to his office (Tr. 532). Nis-

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* Nisnewitz admitted on cross-examination that he knew the information with respect to La Ferla's employment was false (Tr. 668-70).

newitz testified that Ms. Prenclau came to his office twice (Tr. 533) in connection with a loan to get into either Dare To Be Great or Koscot and that on her first visit he told her the disadvantages of going into Dare To Be Great or Koscot (Tr. 533). He testified that Ms. Prenclau returned a second time and gave him information concerning the loan and told him because of what he said she was not going into Turner Enterprises (Tr. 534). Nisnewitz testified that he prepared a loan application for Ms. Prenclau based upon information she gave him (GX 1; Tr. 534-35). Nisnewitz denied that he asked Ms. Prenclau whether she could get someone to verify her employment (Tr. 535) but testified that Ms. Prenclau did pay him $100 on her second visit which "would be in contemplation of setting up books, records, and future tax returns" (Tr. 537). Nisnewitz testified on cross-examination that the $100 paid by Ms. Prenclau was for his advice to her not to go into the program (Tr. 598). Nisnewitz testified that he prepared a loan application for National Bank of North America, gave it to Ms. Prenclau and told her to see La Morte (Tr. 537). Nisnewitz then stated that Ms. Prenclau returned to his office (a third time) and brought with her a blank application for First National City Bank which he completed for her and that all the information on that application was obtained from Ms. Prenclau (Tr. 538). Nisnewitz denied ever going to Ms. Prenclau's home and denied receiving a money order from her. Nisnewitz testified that he thought an entry on his books for $100 on January 6, 1972 was the $100 he received from Ms. Prenclau, because that was the date he completed an application for her (Tr. 543-44).

Ramirez

Nisnewitz testified he met Ramirez sometime in January 1971, that he discussed the pros and cons of Dare To Be Great and Koscot and that he told Ramirez he would not recommend it (Tr. 545). Nisnewitz further testified that Ramirez still wanted to go into it and wanted Nisnewitz

to help him fill out an application (Tr. 545). Nisnewitz told Ramirez "that a fee of $150 is in contemplation of going into it, for a future accounting service, any advice that he would be needing, and also for preparation of his 1971 tax returns" (Tr. 545) and that Ramirez paid him $150 (Tr. 557). Nisnewitz admitted preparing the loan application for Manufacturers Hanover Trust but stated that all the information in the application (GX 3) came from Ramirez (Tr. 546-48). Nisnewitz testified that after the application was typed he gave it to Ramirez and told him to see Mr. Westphal at Manufacturers Hanover Trust (Tr. 548). Thereafter Nisnewitz said he learned the loan had been denied (Tr. 549) and he saw Ramirez a second time and prepared a loan application for Ramirez for First National City Bank (Tr. 550). At first Nisnewitz said he prepared two applications for Ramirez at First National City Bank but then said he only prepared one (Tr. 550). Nisnewitz testified that the information contained in the application to First National City Bank (GX 4) was given to him by Ramirez (Tr. 551). Nisnewitz said he told Ramirez to go see "Ramos or somebody" at First National City Bank. He denied having a conversation with Mr. Ramos (Tr. 552) and denied preparing a W-2 statement (Tr. 553) for Ramirez but admitted that as an accountant he prepared thousands of W-2's (Tr. 554).

Rodriguez

Nisnewitz testified that Rodriguez came to his office with Willie Colon and Benny Martinez (Tr. 558) and told him he wanted to get into either Koscot or Dare To Be Great and that Mr. Nisnewitz told him the disadvantages, but Rodriguez still wanted to go into it (Tr. 559). Nisnewitz said Rodriguez gave him information in order for Nisnewitz to fill out a bank application for a loan (Tr. 559) for Manufacturers Hanover Trust (Tr. 560; GX 5) and that Rodriguez gave his employer as Colon Body Shop together with all the other information on the application (Tr. 561-

62). Nisnewitz said he completed the application and told Rodriguez to take it to Manufacturers Hanover Trust (Tr. 562-63) and thereafter he was told by Rodriguez that the loan was denied (Tr. 563). Nisnewitz said he saw Rodriguez again, that he appeared under the influence of liquor, and that Nisnewitz told him to go see La Morte at National Bank of North America (Tr. 564). Nisnewitz testified that Rodriguez came back to him a third time and brought a loan application for National City Bank (Tr. 565-66) which Nisnewitz prepared for him and that all of the information contained in that application (GX 6) was given to him by Rodriguez. Nisnewitz stated that after the application was typed he told Mr. Rodriguez to go see Mr. Ramos and he never heard from Rodriguez again (Tr. 568).

La Ferla

Nisnewitz testified that Roger La Ferla came to his office with Mr. & Mrs. Walther, because they wanted to go into Koscot, and that he told them he didn't think it was a good idea (Tr. 569-70). Nisnewitz said they wanted to procure a loan and asked him if he would help them and that he told them his fee was $150 "to set up any future books, to give them advice, and also tax returns," and that the preparation of the loan application was an accommodation (Tr. 570). Nisnewitz said he didn't remember how many applications he prepared for La Ferla, but he did have the bank application to First National City Bank typed (Tr. 571-72; GX 2). Nisnewitz testified that the information in the application (GX 2) was supplied by La Ferla, including the place of employment, Johnna Graphics, which Nisnewitz admitted was located next door to his office. Nisnewitz testified that he had done some accounting work for Johnna Graphics and also had prepared a financial statement for them in connection with getting a loan from National Bank of North America where he dealt with Thomas La Morte (Tr. 572-74). Nisnewitz denied that it was his idea to use Johnna Graphics as La Ferla's place of employment and stated that La Ferla told him "not to worry

about it" because he signed the application and further that he didn't know whether or not La Ferla was employed at Johnna Graphics (Tr. 575-79). Nisnewitz admitted on cross-examination that he knew the information concerning La Ferla's employment by Johnna Graphics was false (Tr. 668-69). Nisnewitz testified that he gave the typed application to La Ferla and told him to take it to the First National City Bank and told him to see Mr. Ramos. He didn't recall hearing from La Ferla again (Tr. 579-80).

Nisnewitz denied ever having had a conversation with Ramos regarding the loan applications (Tr. 580).

ARGUMENT

POINT I

The prosecutor's summation did not exceed the bounds of fair comment and reply.

Nisnewitz argues that his conviction should be reversed because the prosecutor's summation denied him a fair trial. The claim is without merit.

Appellant's first allegation of misconduct is premised on the contention that Government counsel asserted her personal belief in the truth of the testimony of Jose Ramos, Jr., who testified for the prosecution (Br. at 14-15). The record, however, plainly demonstrates that the challenged remarks were amply justified as fair reply to the closing arguments of defense counsel who branded the prosecution witnesses as "liars" and accused the Government, in unmistakable terms, of coaching these witnesses to lie.

Mr. Friedman, trial counsel for Nisnewitz, stated in his summation that the Government's witnesses "in order not to become defendants, . . . had to come in here *and tell you a story the Government asked them to tell you*" (emphasis added; 30a-31a).

Counsel for co-defendant La Morte during his summation unequivocally asserted his personal belief that the Government's witnesses had committed perjury: "*I think all of these witnesses were liars, as far as I am concerned.* None of them here told the truth or none of them knew how to tell the truth" (emphasis added; 50a-51a). To this he added, "I want to show you how unfair this case was prepared and presented" (53a). He also argued that the co-defendant Ramos "was looking to kill us to gain favor with the United States Attorney's Office (43a) and would say anything so that "he'd get a better break on his sentence" (46a).

In view of the accusations made by defense counsel, the prosecutor's response (77-78a) was well within the bounds of fair play. *Lawn* v. *United States*, 355 U.S. 339, 360 n.15 (1958); *United States* v. *Santana*, 485 F.2d 365, 370-71 (2d Cir. 1973); *United States* v. *La Sorsa*, 480 F.2d 522, 525-26 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973). Mr. Ramos testified on cross-examination that he was telling the truth and that he was not looking to color his testimony in favor of the Government (Tr. 337). The arguments made with respect to his credibility were fully supported by the record. See *United States* v. *De Angelis*, 490 F.2d 1004, 1007-08 (2d Cir.), *cert. denied*, 42 U.S.L.W. 3594 (1974). Moreover, since no objection was made to that portion of the summation below, the claim may not be raised now. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940); see also *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972).

Finally, in view of Nisnewitz's position on this appeal that the "testimony of co-defendant Ramos was essentially harmless regarding appellant" (Br. at 13), it is perfectly clear that the prosecutor's argument concerning Ramos' credibility could not and did not have any significant impact on the jury's verdict. *United States* v. *Socony-Vacuum*

Oil Co., supra, 310 U.S. at 238-39; *United States* v. *Tortora,* 464 F.2d 1202, 1207 (2d Cir.), *cert. denied,* 409 U.S. 1063 (1972); *United States* v. *Elmore,* 423 F.2d 775, 780-81 (4th Cir.), *cert. denied,* 400 U.S. 825 (1970).

Appellant next argues that his conviction should be reversed because Government counsel allegedly distorted the evidence and asserted as fact matters not contained in the record. The first instance cited by appellant relates to the prosecutor's statement that the loan applicants were "hurting for money" (104a). The trial court overruled the objection and held that the argument was proper (105a). Immediately after the objection Government counsel outlined to the jury the evidence of the applicants' financial condition: "Johnny Rodriguez was on welfare. La Ferla was unemployed. Gustavo Ramirez was employed but didn't have the money. And they were all there to get a loan" (105a). The record also shows that Natalie Prenclau testified on cross-examination that she had no money whatever (Tr. 107). The record amply thus supported the challenged statement (Tr. 225, 377, 55).

Nisnewitz next complains about the statement in the Government's summation that the loan applicants "were victims as much as anything." The testimony of the loan applicants supports that statement. Natalie Prenclau wanted to get a new start in life (Tr. 103). The others saw this as an opportunity to make a lot of money (Tr. 151, 218, 242-43). Gustavo Ramirez testified that he invested and lost all of his money.* There was ample sup-

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* Ramirez was asked the following questions by Mr. Drescher:

Q. Did you get the money from any bank loan? A. Yes, of course, First National City Bank.

Q. All right, how much was that? A. How much was it? I think it was $1700. I don't know offhand exactly how much.

Q. Did you put it in this *phony pyramid business?* A. Yes, I did.

Q. I suppose you ended up losing it? A. Exactly (Tr. 217-18) (emphasis added).

port in the record for the prosecutor's statement. Again no objection was made to that statement below, and therefore appellant cannot raise it on appeal. *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 238-239; *United States* v. *Perez, supra,* 426 F.2d at 1081.

Nisnewitz also maintains that the record does not support the prosecutor's argument that Nisnewitz wanted "business", "clients" and "to make money" (103a-104a). Again no objection was made below. The record did support this argument (Tr. 595), and the comment was a permissible inference to be drawn from the facts proved at trial. Ironically, the attorney for La Morte made the same argument to the jury to which no objection was made (64a).

Similarly, the prosecutor's comments concerning the $50 money order, when examined in their entirety (81-83a), also are clearly supported by the record (Tr. 99, 142, 272).

It is true, as Nisnewitz points out, that Government counsel inaccurately told the jury that Natalie Prenclau testified she didn't remember whether she was told to see Ramos at the First National City Bank and that the record was silent on whether there was a loan from the National Bank of North America, although the prosecutor said there was no such loan. However, upon objection, the jury in both instances was immediately given cautionary instructions (85a, 89a) which cured the errors. See *Gaither* v. *United States,* 413 F.2d 1061, 1080 (D.C. Cir. 1969).

Nisnewitz's final attack on the prosecutor's summation is based on a claim that she improperly attempted to bolster the credibility of the Government's witnesses by injecting the prestige of the Government and the United States Attorney's Office into the jury's deliberations. There is no merit to the argument.

At the outset of her summation, the prosecutor stressed the importance of the case to both sides: "This is a

terribly important case to the government, and it is terribly important to both of the defendants on trial here" (70a).

She later told the jury:

> "This is a very important case to the government. The government's responsibility [is] to enforce criminal laws. You heard Mr. Drescher make accusations that the United States Attorney's Office is all but suborning perjury on that stand. It is the duty of the United States Attorney's Office to see that the criminal laws are enforced and that the reason that we are here is to present evidence to you, and you make that determination. Our job is to present the evidence. Your job is to determine the facts. The Judge's job, if you determine that the facts are that these defendants did violate federal law, it is for the judge to deal with sentencing" (70a-71a).

There is simply nothing unfair or improper about these comments.

The argument made by the prosecutor that the United States Attorney's Office does not suborn perjury and that no case is so important that the Government would knowingly present such testimony was clearly supported by the record (Tr. 337), and was unquestionably an appropriate response to the defense attack on the integrity of the United States Attorney's Office in the preparation and presentation of the case and the unmistakable suggestion that the prosecution had coached its witnesses to lie. See *United States* v. *Santana, supra,* 485 F.2d at 370-71; *United States* v. *La Sorsa, supra,* 480 F.2d 525-26; *United States* v. *De Angelis, supra,* 490 F.2d at 1007-08.

In light of the clear and overwhelming evidence introduced against the defendant and the careful instructions given by Judge Owen with respect to the summations, any

error in the prosecutor's summation was harmless beyond a reasonable doubt.* See *United States* v. *Bivona*, 487 F.2d 443 (2d Cir. 1973).

POINT II

The evidence on Count 7 as to Nisnewitz was overwhelming.

Appellant argues that the acquittal of La Morte on Count 7 (the conspiracy count) required the trial court to set aside his conviction on that count. The argument is erroneously premised on the theory that since Ramos did not allegedly inculpate Nisnewitz, there was no one else left for the latter to conspire with and therefore the evidence was insufficient to warrant conviction. Assuming *arguendo* that the testimony of Ramos did not inculpate Nisnewitz,** appellant completely overlooks the fact that the four loan applicants named in Counts 1 through 6 were named as co-conspirators and each testified that Nis-

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* The court below cautioned the jury respecting the summations on two occasions, stating:

> "As I have already told you, anything that counsel, either for the government or for any defendant may have said with respect to matters in evidence, whether during the trial, in a question, in an argument, *or in the summation*, is not to be substituted for your own recollection of the evidence (129a).
>
> And in particular:
>
> I wish to add, there has been dispute in summations as to the testimony in various critical particulars. Thus, it is important to your deliberations that *you, whose recollection governs,* be confident in that recollection" (130a) (emphasis supplied).

** Nisnewitz ignores Ramos' testimony that he (Ramos) knew that applications referred to him by Nisnewitz and La Morte contained false information (Tr. 369-72).

newitz completed loan applications which he knew contained false information and then referred these applicants to First National City Bank and Manufacturers Hanover Trust Co. The jury therefore could find that Nisnewitz conspired with the loan applicants to commit the offense charged in Count 7. Moreover, Nisnewitz himself admitted that he knew the employment information in one of the applications (La Ferla's) was false (Tr. 668-70).

Herman v. *United States*, 289 F.2d 362 (5th Cir.), *cert. denied*, 368 U.S. 897 (1961), upon which Nisnewitz relies to support his argument, is, in fact, authority to the contrary. There the Court of Appeals declared:

> "The acquittal of one conspirator would thus be immaterial where there are several other named conspirators, or other conspirators charged but unknown to the jury." 289 F.2d at 368.*

Here the acquittal of La Morte on Count 7 was wholly immaterial to the conviction of appellant on Count 7. The evidence supporting this Count is overwhelming.

Furthermore, it is well settled that a jury's verdict cannot be attacked on the ground that it may be inconsistent, *Dunn* v. *United States*, 284 U.S. 390, 393-94 (1932); *United States* v. *Zane*, 495 F.2d 683, 689-90 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3239 (October 21, 1974).

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* Count 7 of the indictment in addition to the loan applicants, referred to other conspirators "known and unknown to the Grand Jury."

POINT III

The Court properly charged the jury with respect to Count 7.

Appellant argues that the Court's charge on Count 7 and the prosecution's summation was confusing to the jury * and requires his conviction on Count 7 to be set aside. It is contended that the District Court "in effect charged the jury that appellant could be guilty of the crime charged in Count 7 if he associated himself with persons who were 'simply innocent intermediaries'," and that "the Court's charge left it open for the jury to apply the tests of aiding the abetting to the charge of conspiracy, involving different elements" (Br. at 29). Appellant did not object to that portion of the Court's charge which precludes appellate review. See, Fed. R. Crim. P. 30, *United States* v. *Pinto,* Dkt. No. 74-1202 (2d Cir., July 31, 1974) Slip Op. 5098; *United States* v. *Projansky,* 465 F.2d 123, 135 (2d Cir.), *cert. denied,* 409 U.S. 1006 (1973); *United States* v. *Indiviglio,* 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied,* 383 U.S. 907 (1966).

Appellant has misread the court's charge on aiding and abetting which was as follows:

> "Since it is claimed that these loan applications involved were those of others, and that Mr. Nisnewitz did not sign any of them, the government is also relying upon Title 18, United States Code, Section 2, which states:
>
> "A. Whoever commits an offense against the United States or aids, abets, counsels, commands,

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* No objection was made to that portion of the prosecution's summation (98a) and therefore it is not subject to review on appeal. *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 238-39; *United States* v. *Perez, supra,* 426 F.2d at 1081.

induces or procures its commission is punishable as a principal."

"B, Whoever wilfully causes an act to be done which, if directly performed by him or another, would be an offense against the United States, is punishable as a principal."

Now I charge you that in order to convict, it is not necessary for the government to show that Mr. Nisnewitz physically made a false statement or that he applied for a loan.

The law is that one who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself.

To determine whether a person aided and abetted the commission of an offense, you ask yourselves these questions:

Did he associate himself with the venture?

Did he participate in it as something he wished to bring about?

Did he seek by his actions to make it succeed?

If he did, then he is an aider and abettor.

Under the law, a person may be guilty of making a false statement if *he knowingly causes another to do the act, resulting in the misstatement of fact,* whether the party thus actually making the misstatement of fact is a knowing participant in the falsification or simply an innocent intermediary whose misstatement is the result of ignorance, negligence, or misunderstanding rather than intention" (emphasis added, 139a-140a).

The District Court did not charge, as appellant contends, that appellant could be found guilty of the crime

charged in Count 7 if he merely associated himself with persons who were innocent intermediaries (Br. at 29).* Judge Owen charged in connection with aiding and abetting that if the *defendant knowingly* caused another to do an act which resulted in a misstatement of fact he could be an aider and abettor even if the person he caused to act was not a knowing participant.

The District Court's instruction on aiding and abetting was completely correct and not inconsistent with instructions concerning the conspiracy offense.** *Cf. Nye & Nissen* v. *United States,* 336 U.S. 613, 618 (1949).

The District Court specifically instructed the jury on Count 7 as follows: "I charge you in this connection that you may not draw an inference of participation in this conspiracy from the mere association and friendship between some alleged co-conspirators or between some defendants" (152a).

Appellant's speculation that the jury was confused is not supported by the record. The fact that the jury asked to have the elements of conspiracy read to them does not support appellant's argument that the jury was confused as to aiding and abetting. As this Court observed in *United States* v. *Nadler,* 353 F.2d 570, 572-73 (2d Cir. 1965):

> "The world outside the jury room, including appellate courts, will never know (and is not supposed to know) the particular portions of the charge, if

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* On the evidence in this case there were no innocent intermediaries. The loan applicants were named as co-conspirators and all admitted that they knew the statements in the loan applications were false.

** There is no claim that there was insufficient evidence to convict the appellant of the conspiracy charged in Count 7. See, *United States* v. *Falcone,* 311 U.S. 205 (1940).

> any, on which juries rely in reaching their verdicts. Unless some specific instruction so far departs from the standards set by the law that the appellate court is convinced that the jury might have been misled, such courts usually prefer to examine the charge as a whole—probably on the theory that the impression they receive from the printed words will be that which the jury has received from the spoken words."

Here the District Court's charge, which must be read as a whole, *United States* v. *Hernandez,* 361 F.2d 446 (2d Cir. 1966); *United States* v. *Hines,* 256 F.2d 561 (2d Cir. 1958); see also *Cupp* v. *Naughton*, 414 U.S. 141 (1973), was not confusing nor can it be said that the jury was misled by any specific portion of it.

POINT IV

Venue was proper in the Southern District on Counts 3 and 5.

Appellant argues that his conviction on counts 3 and 5 must be set aside because venue did not properly lie in the Southern District of New York but rather in the Eastern District of New York because the loan applications which were the subject of counts 3 and 5 were submitted to a branch of Manufacturers Hanover Trust in Queens. At the outset it should be noted that this argument was not raised until the sentencing at which time the trial court properly rejected it on the basis of this Court's holding in *United States* v. *Candella,* 487 F.2d 1223 (2d Cir. 1973).

The threshold question is whether appellant has waived his right to object to venue on this appeal. This Court held in *United States* v. *Price,* 447 F.2d 23, 27 (2d Cir.), *cert. denied,* 404 U.S. 912 (1971) that failure to object to

venue is waived "when, after the government has concluded its case, the defendant specifies grounds for acquittal but is silent as to venue."

After a seven-day trial, counsel for appellant moved to dismiss all charges against his client "on the grounds that the government has failed to prove its case by a quantity of evidence required" (Tr. 746). The motion was denied. Venue was never mentioned. Counsel for appellant then joined in Mr. Drescher's motion to dismiss the conspiracy count stating:

> "there has been no testimony linking Mr. Nisnewitz with Mr. La Morte and Mr. Ramos in any conspiracy. *Obviously, there has been testimony enough to make out a prima facie case as to the six substantive counts*" (Tr. 523; emphasis added).*

Having conceded on the record at the close of the Government's case that a *prima facie* case had been presented against appellant on counts 3 and 5, appellant's trial counsel implicitly acknowledged that venue as to those counts was proper.

A motion challenging venue at the time of sentencing is simply too late. *United States* v. *Powell,* 498 F.2d 890 (9th Cir. 1974); *United States* v. *McMaster,* 343 F.2d 176, 181 (6th Cir.), *cert. denied,* 382 U.S. 818 (1965); *United States* v. *Polin,* 323 F.2d 549, 557 (3d Cir. 1963).

In any event, venue was proper in the Southern District on counts 3 and 5. The testimony at trial established that the two applications referred to in counts 3 and 5 were submitted to a branch of the Manufacturers Hanover Trust in Queens. However, a bank employee Reuben Slutsky, testified that the procedure followed by Manufacturers Hanover in processing personal loan applications is to send the applications to the main office at 4 New York

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* Counts 3 and 5 were substantive counts.

Plaza, in Manhattan, for credit checks and either approval or declination (Tr. 49-50; See GX 3 and 5).

The loan applications in counts 3 and 5 were in fact reviewed at the bank's main office in the Southern District of New York (GX 3 and 5). Venue therefore was properly laid in the Southern District of New York under Title 18, United States Code, Section 3237 which provides in pertinent part:

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

The gravamen of the offense committed under 18 U.S.C. § 1014 is making a false statement for the purpose of influencing a federally insured bank. *Kay* v. *United States*, 303 U.S. 1 (1937); *United States* v. *Niro*, 338 F.2d 439 (2d Cir. 1964); *United States* v. *Sabatino*, 485 F.2d 540 (2d Cir. 1973). In this case, the evidence established that the bank reviewed the loan applications in Manhattan. Hence, although the offense was begun in Queens, it continued and was completed in Manhattan where the loan applications were reviewed.

United States v. *Candella, supra*, 487 F.2d 1223, is directly in point. There it was held that in a prosecution under 18 U.S.C. § 1001 where affidavits and bills of lading were "simply accepted at the City's branch office in Brooklyn for the convenience of parties seeking to file papers with the Department of Relocation and were then conveyed to the central office in Manhattan for examination and payment", 487 F.2d at 1227, there was an offense committed in more than one district, 18 U.S.C. § 3237(a). Those are

precisely the facts in this case.* Manufacturers Hanover simply accepted the loan applications at its branch office in Queens for the convenience of its customers and then conveyed the applications to the central office in Manhattan for review and approval or declination. Checks for payment could be sent from the main office to the branch to be picked up by an applicant (See, GX 3).

This Court in *Candella* noted that although enough was done in the Eastern District to constitute a crime there, it did not follow that the crime then terminated, and that what transpired in Manhattan was irrelevant for venue purposes.** The Court held

> "the false statements here were intended to produce funds.
>
> The statements continued to be false . . . not only when initially presented but also upon arrival in Manhattan, where the decision was reached to make the funds available." 487 F.2d at 1228.

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* Appellants do not and cannot cite any support in the record for their argument that "the applications were submitted to the branch in Queens over which Nisnewitz allegedly had influence by virtue of his relationship with one Westphal, the bank's loan officer" (Br. p. 36). The loan applicants testified that they were told by Mr. Nisnewitz to see Mr. Westphal at Manufacturers Hanover.

** It is submitted that Judge Lasker in dismissing indictment 74 Cr. 95, on the ground that venue was not proper in the Southern District of New York, incorrectly held on similar facts that the crime, if any, was completed in the Eastern District of New York. In any event the *Candella* case was not brought to his attention. The circumstances surrounding that decision by Judge Lasker were described to Judge Owen (See 189a-190a).

This is precisely the situation here and demonstrates that venue was properly laid in the Southern District of New York.*

POINT V

The sentencing was in all respects proper.

Appellant contends that the District Court abused its discretion in imposing a prison sentence of a year and a day. The claim is frivolous.

Judge Owen carefully set forth the factors which he considered in sentencing appellant (206a-210a), and twice stated that he had "agonized" over this sentence (208a-209a), but that he could not place Nisnewitz on probation.

Appellant was convicted on six counts (counts 1-6) of violating 18 U.S.C. § 1014, each count carrying a maximum statutory penalty of two years incarceration and a possible fine of $5000, and on one count (count 7) of violating 18 U.S.C. § 371, carrying a maximum statutory penalty of five years incarceration and a possible fine of $10,000. He was sentenced to one year and one day on each of counts 1-6, to run concurrently. Appellant also received a one year and one day sentence as to count 7, but that sentence was suspended, and he was placed on probation for five years. Thus, although appellant faced a possible maximum statutory prison term of seventeen years, his actual prison sentence is to run for one year and one day.

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* Putting to one side whether the decision by Judge Tyler in *United States* v. *Flaxman*, 304 F. Supp. 1301 (S.D.N.Y. 1969) is correct, it is distinguishable from the instant case. In the *Flaxman* case loan applications were originally reviewed in the Eastern District and under VA regulations should have been sent to a VA office in Brooklyn. However, they were sent to Manhattan. Judge Tyler dismissed the indictment for improper venue.

Appellant clearly does not allege any "extraordinary circumstances" necessary to secure appellate review of his sentence. See, *United States* v. *Brown*, 479 F.2d 1170 (2d Cir. 1973). Far from asserting a claim of constitutional magnitude, *United States* v. *Tucker*, 404 U.S. 443, 447 (1972) appellant simply disagrees with the weight placed on certain factors by Judge Owen, factors which were plainly appropriate considerations to a sentencing decision. And, although this Court has repeatedly refused to impose a *per se* requirement that a district judge formally give reasons for his sentencing decisions, *United States* v. *Velazquez*, 482 F.2d 139 at 142 (2d Cir. 1973), the record discloses that Judge Owen gave ample justification for his decision.

Where a sentence has been imposed well below the statutory maximum and with due and careful consideration for the individual merits of the case, it cannot be complained of as abusive, and there is no authorization for this Court to substitute its discretion for that properly exercised by the trial court. *United States* v. *Tucker, supra, Gore* v. *United States*, 357 U.S. 886, 393 (1958); *United States* v. *McCord*, 466 F.2d 17 (2d Cir. 1972); *United States* v. *Sweig*, 454 F.2d 181 (2d Cir. 1972).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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PATRICIA M. HYNES,
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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

CARMEN CABALLERO, being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 7th day of November, 1974, she served a copy of the within Briefs by placing the same in a properly postpaid franked envelope addressed:

David M. Brodsky, Esq.
Guggenheimer & Untermyer, Esqs.
80 Pine Street
New York, New York 10005

And deponent further says that she sealed the said envelope and placed the same in the mail ---- drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Carmen Caballero

CARMEN CABALLERO
Secretary to P. M. Hynes, Esq.

Sworn to before me this
7th day of November, 1974

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975